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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TURNER BROADCASTING SYSTEM, INC., et al., Plaintiffs, v. FEDERAL COMMUNICATIONS COMMISSION, et al., Defendants.	Civil Action No. 92-2247 (and Consolidated Cases Civil Action Nos. 92-2292, 92-2494, 92-2495, 92-2558) (SFW, TPJ, SS)

PUBLIC BROADCASTER DEFENDANT-INTERVENORS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

At this point, both plaintiffs and defendants have had a full opportunity to respond to the Supreme Court's directive in this case. It is now evident that there is no dispute regarding the facts that are material to the public broadcasters' summary judgment motion. It is likewise clear that the motion must be granted.[1]

In their opposition briefs, plaintiffs again fail to address the body of evidence that was before Congress when it considered must-carry for public television stations. As shown in the public broadcasters' earlier briefs, that evidence strongly supports the enactment of Section 5. Congress correctly perceived that public television stations had experienced a substantial number of adverse cable actions in the period when must-carry was not in effect, and that their noncommercial status places them at continuing risk in view of the commercial incentives that drive cable operators' carriage decisions. Plaintiffs' failure to confront the entirety of the legislative record is essentially an acknowledgment that that record provides

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[1] As before, the public broadcasters incorporate by reference the memoranda and other materials submitted by the federal defendants and the commercial broadcasters. This reply memorandum focuses particularly on Section 5 of the 1992 Cable Act, the must-carry provisions for public television stations.

As explained further in the public broadcasters' opposition brief (p. 3 & n.2), there are disputes of fact material to plaintiffs' summary judgment motions, and those motions must be denied.

a reasonable basis for Congress to provide must-carry protection for public television.

Congress' decision to enact Section 5 is not surprising. The Association of America's Public Television Stations ("APTS"), representative of public television stations, and the National Cable Television Association ("NCTA"), representative of cable operators and cable programmers and a plaintiff here, jointly recommended to Congress the provisions that ultimately became Section 5. There was virtually no indication of opposition to these provisions before Congress. With the interested parties on both sides of the issue recommending passage of a specific legislative proposal, it was entirely reasonable for Congress to act.

Because the legislative record, standing alone, shows that Congress had a reasonable basis for enacting Section 5, there is no need for the Court to consider additional evidence. Indeed, under the circumstances of this case, a decision based on new evidence would be inconsistent with the important principle, emphasized by the Supreme Court in this case, that courts owe substantial deference to the judgments of Congress and should not undertake to reweigh evidence de novo. See Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2471 (1994).

In any event, as explained below, much of the additional evidence developed on remand by both defendants and plaintiffs supports Congress' judgment in enacting Section 5. To

the extent plaintiffs criticize the public broadcasters' evidence, their arguments fail, as shown in Part II below. At the end of the day, the criticisms are irrelevant, because plaintiffs' own evidence supports the conclusion that public television stations have a need for must-carry protection.

Congress studied the issue of must-carry at great length, held numerous hearings, and developed a massive record on the subject. That record includes substantial evidence regarding public television stations and their need for must-carry. Before Congress, there was no dispute concerning Section 5, only unanimous endorsement by the parties concerned. In these circumstances, the Court clearly should defer to Congress' judgment that important government interests would be served by providing must-carry protection for public television stations. On the record in this case, and particularly in view of NCTA's endorsement, the Court can readily conclude that Section 5 does not impose substantially more burden on cable than is necessary to serve those interests. The public broadcasters' motion for summary judgment should be granted.

ARGUMENT

Part I below explains that this case should be decided on the basis of the evidence before Congress and that that evidence requires grant of the public broadcasters' summary judgment motion. Part II shows that the assertions plaintiffs

Time Warner and Discovery make concerning portions of the public broadcasters' evidence are both irrelevant and incorrect and should be disregarded by this Court.

I. SECTION 5 MUST BE UPHELD BASED ON THE EVIDENCE THAT WAS BEFORE CONGRESS.

In their opposition briefs, plaintiffs again avoid discussion of the body of evidence before Congress, preferring instead to concentrate primarily on the evidence that has been developed on remand. The Supreme Court made clear, however, that this Court must review the evidence in the legislative record to determine whether it is sufficient to support Congress' judgment. Because that record contains substantial evidence supporting Congress' decision to enact Section 5, summary judgment should be granted for the public broadcasters.[2]

A. The Evidence Before Congress Provided a Reasonable Basis for Congress To Enact Section 5.

The public broadcasters' opening brief described at length the substantial evidence before Congress that supports must-carry protection for public television stations. Over

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[2] See Pub. Br. June 16 Br., pp. 4-9.

In this memorandum, the public broadcasters' opening memorandum in support of summary judgment will be referred to as "Pub. Br. May 26 Br." The public broadcasters' memorandum in opposition to plaintiffs' summary judgment motions will be referred to as "Pub. Br. June 16 Br." Appendices to those memoranda are referred to as "Pub. Br. May 26 App., Vol. ___" and "Pub. Br. June 16 App."

30 volumes of appendices submitted by the public broadcasters and other defendants set out in exhaustive detail the supporting evidence in the legislative record.

Briefly, the evidence before Congress specifically relating to public television shows the following:

- In considering must-carry, Congress was concerned with both ensuring universal access to public television services and preserving the nation's investment in public television stations. See Pub. Br. May 26 Br., pp. 15-21.

- Cable operators have commercial incentives that make it likely that they will take adverse carriage actions against noncommercial stations. See id. at 21-24.

- A significant number of public television stations had in fact been dropped, shifted to a less favorable channel, or not carried at all in the 1985-1992 period. This was shown both by the results of the 1988 FCC survey and by reports concerning experiences of individual public television stations. See id. at 24-31.

- Such adverse cable actions caused financial harm to public television stations and also deprived viewers of diverse, noncommercial program services. Congress heard testimony about examples of the financial effects of cable drops and shifts, particularly stations' loss of viewer contributions, and the loss suffered by viewers who were cut off from telecourses and other unique programming offered by local public television stations. See id. at 31-45.

- These adverse effects could lead to long term damage to individual stations and to the public television system as a whole, particularly in view of the interdependent nature of the financing arrangements for public television programming. See id. at 32-34, 35.

- The provisions of Section 5 would not burden the cable industry in any significant way. In addition to receiving evidence on this point, Congress was aware that the NCTA was recommending the proposal that ultimately became Section 5. See id. at 48-52.

There was virtually no evidence before Congress to rebut any of these points. None of the plaintiffs in this case came forward to argue that public television stations do not need must-carry protection, that being dropped or shifted would not harm such stations, or that the Section 5 provisions would unduly infringe on their First Amendment rights or otherwise burden cable companies.[3]

In fact, the cable industry joined public television in recommending that Congress enact the provisions that ultimately became Section 5. As explained in the public broadcasters' earlier briefs, in March 1990 the trade associations for public television and cable negotiated a legislative proposal covering must-carry for public television and jointly recommended it to Congress.[4] Far from advising Congress that there was no need for must-carry protection for public television stations, the President of NCTA, James Mooney, testified several times before Congress that the joint legislative proposal provided a guarantee

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[3] Plaintiff Time Warner argues after the fact that a portion of the evidence presented to Congress in support of Section 5 was inaccurate. Time Warner June 16 Brief, pp. 42-46. In Part II below, we show that these arguments are without merit and that, in any event, they are irrelevant, because plaintiffs' own evidence on these points is entirely consistent with the evidence before Congress.

[4] Pub. Br. May 26 Br., pp. 51-52, 82-83; Pub. Br. June 16 Br., pp. 24-25 & n.36.

that public television "will remain an integral part of cable's basic programming package."[5]

In these circumstances, it was clearly reasonable for Congress to enact Section 5. Indeed, it would have been truly remarkable if Congress had reached any other conclusion. Congress had heard substantial testimony reporting on the existence of a problem and the need for future protection of public television stations, and no one stepped forward with evidence to the contrary. The two interested groups -- public television and the cable industry -- were united in their recommendation of legislative language to address the situation. With a strong, unrebutted record in favor of Section 5, and the united endorsement of the groups on both sides of the issue, it would be difficult for Congress to have reached a different conclusion.

Because the substantial evidence before Congress provides more than enough support for its decision to enact Section 5, the Court should decide on that record alone and grant summary judgment upholding Section 5.

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[5] Cable TV Consumer Protection Act of 1989:- Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 101st Cong., 2d Sess. 70 (1990), CR VOL I.H, EXH. 15, CR 05644; Cable Television Regulation (Part 2): Hearings Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 101st Cong., 2d Sess. 151 (1990), CR VOL. I.I, EXH. 16, CR 06318.

B. Additional Evidence Submitted by Both Plaintiffs and Defendants Supports Congress' Judgment Regarding Section 5.

Because the legislative record is sufficient, there is no need for the Court to look further in considering the constitutionality of Section 5. It should be noted, however, that additional evidence introduced by both plaintiffs and defendants in this case supports the conclusions Congress reached on this subject. On several key points, the evidence developed on remand has converged to produce essentially undisputed support for Congress' judgments.

First, additional evidence introduced by both defendants and plaintiffs confirms that, to a substantial degree, public television stations were not being carried in the absence of must-carry regulation. Defendants have provided carriage data maintained by Cable Data Corporation ("CDC") showing that large numbers of public television stations were dropped, or were not carried at all, during the 1985-1992 period. The CDC data indicate that, by the end of 1992, 314 public television stations had been dropped from carriage by 1,616 different cable systems. Feldman Decl. ¶ 11.[6] By 1992, public television stations had lost access to more than 10 million cable subscribers as a result of these drops. Id. ¶ 12. These data indicate that the

[6] See Pub. Br. May 26 App., Vol. 4.

information before Congress concerning drops and noncarriage was significantly understated.[7]

At the same time, plaintiffs' expert, Dr. Stanley Besen, testifies that large numbers of public television services were not being carried in late 1992. Dr. Besen testifies in his expert declaration that in late 1992 a typical cable subscriber had access to only 78 percent of local public television stations. Besen Decl., pp. 5, 44.[8] After correction for Dr. Besen's error in averaging technique, this subscriber-weighted figure drops to 64 percent. Rohlfs Rebuttal Decl. ¶¶ 6-15.[9] In other words, local public television stations were denied access to cable subscribers over one-third of the time in the absence of must-carry.[10] Thus, it is undisputed that a substantial number of public television stations were not carried in the absence of must-carry.

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[7] See also Pub. Br. May 26 Br., pp. 62-64; Pub. Br. June 16 Br., pp. 20-21.

[8] Dr. Besen's figures for UHF public television stations show even lower carriage levels, in the range of 69 to 70 percent. Besen Decl., Exs. C-4, C-5.

[9] See Pub. Br. June 16 Br., pp. 13-15.

[10] Dr. Besen's appendices show noncarriage of over one-third of public television stations on the average cable system as of late 1992. Besen Decl., Ex. C-3. This figure is based on a system-weighted, rather than subscriber-weighted, average. Even these figures underestimate the level of noncarriage because they rest on a definition of "local" that is confined to a 50-mile distance between the station and the cable headend. Section 5 defines "local" with reference not only to the 50-mile distance but also to the station's Grade B service contour.

It is also undisputed that public television stations are likely to be dropped in the future in the absence of must-carry. The public broadcasters have cited evidence presented to Congress indicating that cable operators motivated by commercial incentives would be disinclined to carry public television's noncommercial services in a number of instances.[11] In addition, Dr. Noll has testified at length about the economic incentives that affect cable operators' carriage decisions. He explains that these incentives will lead cable operators to drop particularly the second or third public television station in a market.[12]

Defendants' evidence regarding cable incentives is reinforced by the testimony of Time Warner witnesses, who assert that they plan to remove various public televisions stations from their systems if must-carry is overturned.[13] This evidence, along with Dr. Besen's historical data, confirms Congress'

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[11] See Pub. Br. May 26 Br., pp. 21-24.

[12] See Noll Decl. ¶ 29; see also id. ¶¶ 7-35 (discussing more generally the economic incentives of cable operators to drop broadcast stations). Dr. Noll's Declaration is found in Defendants' Joint Submission of Expert Affidavits, Vol. II.B, filed on May 26, 1995. In addition, both the federal defendants and NAB/INTV detail the substantial and increasing incentives for cable operators to treat broadcast stations adversely. See NAB/INTV May 26 Br., pp. 31-40 (evidence before Congress) and 68-81 (new evidence); NAB/INTV June 16 Br., pp. 35-46; Gov. May 26 Br., pp. 7-16 (evidence before Congress); and 45-64 (new evidence); Gov. June 21 Br., pp. 19-32.

[13] See Pub. Br. June 16 Br., p. 21 & nn.31, 32.

judgment that public television stations were in need of must-carry protection.

Furthermore, there is no dispute regarding the existence of the 1990 agreement between APTS and NCTA, its terms, and the fact that those terms are essentially identical to the language Congress eventually enacted as Section 5. This is one of the subjects as to which the parties were able to stipulate for purposes of their Joint Statement of Undisputed Facts, submitted on May 26, 1995.[14] The opening brief filed by the Turner plaintiffs confirms that Section 5 "fundamentally adopted the terms" of the 1990 NCTA-APTS agreement. Turner May 26 Brief, p. 58 n.145.

Finally, there is no significant dispute about the facts relating to the effect of must-carry on cable companies. While the parties dispute the significance of the available statistics, there is not a substantial disagreement regarding the data themselves. The statistics indicate that only 1.5 percent of cable operators' channel capacity is occupied by stations added pursuant to must-carry and that, due to expanding channel capacity, cable operators (after fulfilling must-carry requirements) are able to carry over 99.8 percent of the

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[14] See All Parties' Joint Statement of Undisputed Facts ¶¶ 18-34.

programming they were carrying at the time the 1992 Cable Act was passed.[15]

There also appears to be no real dispute that Section 5 has had a very limited effect on cable companies. Congress had evidence that very few cable systems would be required to carry three or more public television stations, and the NCTA endorsement of the proposed legislation confirmed that cable did not foresee an undue burden as a result of Section 5.[16] The declarations submitted by plaintiffs refer to a relatively small number of additions of public television stations. Discovery's declaration refers to no such additions; the Turner plaintiffs and Time Warner cite only a few dozen instances in which public television stations were added, out of more than 11,000 cable systems.[17] Plaintiffs' opposition briefs do not even attempt to rebut the public broadcasters' arguments concerning lack of burden.

If there were any doubts regarding the reasonableness of Congress' judgments on these key points, they should be put to rest. The undisputed evidence described above confirms Congress' decision to enact Section 5.

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[15] See NAB/INTV May 26 Br., pp. 104-10.

[16] See Pub. Br. May 26 Br., pp. 50-52.

[17] See Pub. Br. June 16 Br., pp. 27-30 & n.44.

C. Plaintiffs' After-the-Fact Presentation of New Evidence To Challenge Congress' Judgment Must Be Rejected.

Plaintiffs attempt to resist summary judgment by introducing new evidence. Some of this evidence actually supports defendants' position, as noted above. The other new evidence does not provide a basis to strike down Section 5. The Court should reject plaintiffs' after-the-fact efforts to challenge Congress' judgment.[18]

The Supreme Court plurality in this case clearly intended that this Court look initially to the legislative record. The plurality stressed that the purpose of judicial review in First Amendment cases "is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." Turner, 114 S. Ct. at 2471. The plurality emphasized that the "obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence de novo, or to "replace Congress' factual predictions with our own." Id. The Supreme

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[18] The extent to which plaintiffs urge the Court to second-guess Congress' judgment is quite extraordinary. Their introduction of a large body of new evidence appears to be intended to divert the Court's attention from the legislative record and to create the appearance that there are disputed issues of fact. The new evidence unquestionably creates disputes and certainly precludes any grant of summary judgment for plaintiffs. However, none of the disputes is material to the public broadcasters' motion. Because the content of the record before Congress is undisputed and because that record contains substantial evidence supporting enactment of Section 5, the Court can and should uphold Section 5 as a matter of law.

Court did not require this Court to consider additional evidence unless the legislative record appeared insufficient to support Congress' judgment. Id. at 2472; see also id. at 2473-75 (Stevens, J., concurring).

It is particularly appropriate to look solely to the legislative record in this case. Congress and the FCC studied the must-carry issue for close to five years, compiling an enormous record on the subject. Large amounts of data relating to must carry were submitted to both Congress and the Commission. The committee reports contain extensive and thoughtful discussions of must-carry and related issues, and Congress made unusually detailed findings in support of its action.

Plaintiffs cannot complain that the congressional record is somehow incomplete. They were well represented in the legislative process and were free to present evidence before Congress in an effort to show that public television stations had no need for must-carry protection or that granting protection in the form proposed by APTS and NCTA would impose a significant burden on cable companies. Congress would have been better equipped than any court to evaluate such evidence in the context of its overall consideration of must-carry and other cable-related issues. See Turner, 114 S. Ct. at 2471. However, plaintiffs did not attempt to introduce such evidence; rather, as discussed above, NCTA expressly endorsed the terms of Section 5.

Plaintiffs and other members of the cable industry certainly were not a "discrete and insular minorit[y]" (United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938)) that was unable to make itself heard before Congress or that was otherwise disenfranchised from the political process. Indeed, plaintiffs are enormously wealthy and powerful interests that had at their command opportunities and all the available techniques for influencing litigation.

In these circumstances it would be absurd to allow plaintiffs to challenge the legislative record with new evidence. While it may be appropriate to consider evidence outside the legislative record when Congress has failed to hold hearings or otherwise create a record in support of a provision that allegedly infringes on First Amendment rights, this is not such a case. Here, where Congress has created a substantial record supporting its action -- and parties subsequently attacking that action had a full opportunity to submit evidence to Congress but failed to do so -- there is no reason to allow after-the-fact introduction of new evidence for the purpose of undermining the legislative record.

The question of what evidence was before Congress when it passed the 1992 Cable Act is undisputed. If this Court can conclude as a matter of law that Congress drew "reasonable inferences" from "substantial evidence" in that record, then Section 5 should be upheld. Turner, 114 S. Ct. at 2471. In

these circumstances, the Court should not go further and consider evidence outside the legislative record. The Supreme Court admonished that on remand this Court should not assume the role of the legislature, "replac[ing] Congress' factual predictions with [its] own." Id. That is precisely what plaintiffs are asking this Court to do. Their request should be rejected.

In the end, there is no reason to permit plaintiffs to go beyond the evidence that was before Congress. Because the legislative record contained more than enough evidence to support Congress' decision to enact Section 5, and in fact reflected no dispute about the propriety of the legislation, the Court should grant summary judgment for the public broadcasters.

II. PLAINTIFFS' CLAIM THAT PUBLIC TELEVISION STATIONS HAVE NO NEED FOR MUST-CARRY PROTECTION IS FRIVOLOUS.

Plaintiff NCTA and the Turner programmer plaintiffs barely mention Section 5 in their opposition briefs. No plaintiff argues in its opposition brief that Section 5 imposes any undue burden on it or on the cable industry as a whole. However, plaintiffs Time Warner and Discovery expend considerable energy in criticizing the evidence the public broadcasters have put forward concerning the need of public television stations for must-carry protection. Although their industry association

endorsed the terms of Section 5,[19] and they themselves apparently put no evidence before Congress on the subject, Time Warner and Discovery now insist that there was no need for such a measure.

The arguments Time Warner/Discovery put forward are wholly ineffective. Their attacks on the public broadcasters' evidence of adverse cable actions are irrelevant, because their own expert's evidence indicates that public television stations were subject to substantial noncarriage in the absence of must-carry protection. Moreover, as shown below, the Time Warner/Discovery arguments are contrary to common sense and to arguments made by their co-plaintiffs and are based on significant distortions of the record.

Before turning to the specifics of the Time Warner/ Discovery evidentiary points, however, we address a preliminary argument Time Warner advances. Time Warner points to a provision of the Cable Communications Policy Act of 1984, 47 U.S.C. § 531 (1988), under which local franchise authorities may designate certain cable channels for public, educational and governmental ("PEG") use. It asserts that this provision creates a safety net for public broadcasting stations, but that no public television

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[19] As noted in the public broadcasters' opposition brief, representatives of Time Warner, Turner, and USA Network were on the NCTA Board when the Association endorsed the proposed legislation. See Pub. Br. June 16 Br., p. 25 n.36 & NCTA Listing tab of the Appendix to that brief.

station ever attempted to obtain carriage on a PEG channel. According to Time Warner, this constitutes "overpowering evidence" that public television stations were obtaining satisfactory cable carriage without must-carry protection.[20]

The argument is based on a fundamental misunderstanding of the PEG channel provision. That provision was not intended to provide carriage for existing broadcast stations, but rather to grant access to "groups and individuals who generally have not had access to the electronic media."[21] The legislative history cites as examples local governments, schools, and community groups, but expressly excludes licensees of existing media outlets from that list.[22] It was only with the passage of the must-carry statute in 1992 that Congress made specific provision for carriage of public television stations on PEG channels. Under Section 5, a cable operator that is required to add a public television station pursuant to must-carry may place the station on an unused PEG channel, subject to approval of the local franchising authority. 1992 Cable Act § 5(d).[23]

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[20] Time Warner June 16 Br., p. 38.

[21] H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984).

[22] Id.

[23] As explained in the public broadcasters' opening brief, the PEG channel provision was included in Section 5 at the request of NCTA as a way to limit the impact of Section 5 on cable. See Pub. Br. May 26 Br., p. 82.

Thus, far from constituting "overpowering evidence," the fact that public television stations were not carried on PEG channels prior to the 1992 Cable Act proves nothing at all.[24]

A. There Is Substantial Evidence Showing That Significant Numbers of Public Television Stations Will Not Be Carried in the Absence of Must-Carry.

In their May 26 papers, the public broadcasters presented both evidence from the legislative record and additional evidence to show that, without must-carry protection, "significant numbers of [public television] stations will be refused carriage on cable systems." Turner, 114 S. Ct. at 2471. Time Warner/Discovery attempt to undermine portions of this evidence in various ways. They attack several sets of data on drops, switches and noncarriage that the public broadcasters have offered. In addition, they attempt to read isolated statements by public television personnel as support for the proposition that public television stations had no significant cable carriage problems. Even if these arguments were valid (and we show below that they are not), they would be beside the point, because plaintiffs' own expert has established that there was substantial

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[24] There is no evidence that public television stations have not been carried on PEG channels since the 1992 Act was passed. Mr. Brugger merely testified that he was not aware of any occasions on which this had occurred. Brugger Dep., pp. 139-40 (TW Ex. 21). But even assuming PEG channels have not been used, this would tend to show not that there was no need for must-carry for public television stations, but rather that cable operators have not found it necessary to invoke the provision, suggesting that they have felt relatively little impact from the operation of Section 5.

noncarriage of public television stations prior to the passage of Section 5.

As explained in Part I.B above, Dr. Besen's data show that over one-third of the time public television stations were not being carried in the period prior to must-carry. Thus, whatever the merits of the other evidence in the record, plaintiffs' own evidence fully confirms that significant numbers of public television stations were not being carried. Had Congress been aware of Dr. Besen's figures, there is no doubt that it could reasonably have concluded that there was a need for must-carry protection for public television.

In view of Dr. Besen's figures, the Time Warner/Discovery arguments concerning the evidence of adverse carriage actions involving public television stations are essentially irrelevant. Nevertheless, we briefly address these criticisms below.

1. The APTS Data Provided to Congress Were Reliable.

Time Warner alleges that APTS provided Congress with unreliable data concerning carriage problems experienced by public television stations in the years prior to enactment of the 1992 Cable Act.[25] The allegation itself is highly misleading. In support of its claim, Time Warner pulls portions of documents

[25] Time Warner June 16 Br., pp. 42-46.

and deposition transcripts out of context to create a wholly false impression.

APTS previously has acknowledged that some of the lists of drops and channel shifts compiled by its personnel in 1986 and early 1987 reflected certain station reporting errors.[26] However, in mid-1987, following the arrival of a new research director, Dr. Bernadette McGuire, APTS put in place measures to verify reports of adverse carriage actions it received from stations. Thereafter, APTS' reports to Congress and the FCC were the product of this verification process.[27]

Once the systematic verification began, cable challenges to the APTS data ceased. While NCTA had criticized one APTS listing in early 1987 (in colorful language quoted in Time Warner's brief, without identification of the source), it issued no such criticisms thereafter.[28] In these circumstances,

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[26] See Pub. Br. June 16 Br., p. 20 n.28.

[27] See Brugger Decl. ¶¶ 13-15 (Pub. Br. May 26 App., Vol. 1); McGuire Dep., pp. 88-89, 135-38 (Pub. Br. June 16 App.).

[28] Time Warner alleges that "public defendants' current allegations of individual station harm in this litigation are fundamentally different than the allegations of individual station harm submitted to Congress [because] [a]lmost half of the allegations before Congress have simply vanished from the public defendants' present allegations." Time Warner June 16 Br., p. 46 n.28. This statement is misleading in the extreme. In support of its statement Time Warner cites the one APTS list that had been criticized by NCTA -- a January 1987 APTS letter to the FCC listing 150 drops that had been reported to APTS, together with two January 1987 press releases. There is no evidence that this list was forwarded to Congress. In any event, as described in the text, shortly after early 1987, Dr. McGuire instituted a

there is no reason to believe that APTS information provided to Congress during the years must-carry legislation was being considered contained any significant inaccuracies.[29]

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verification process, and subsequent lists reflected the results of this process. It is these later lists on which Congress would have relied. See Pub. Br. May 26 Br., pp. 27-28.

Time Warner's only support for its claim that the public broadcasters "continued to feed Congress faulty information" is an assertion that a 1988 APTS document shows a higher figure for drops than a 1989 APTS document. The higher figure, however, is consistent with other documents that were verified by Dr. McGuire after her arrival at APTS. See, e.g., APTS 001213 (March 23, 1988, memorandum from Dr. McGuire citing 106 instances of drops). (See Tab 2 of the Appendix to this reply memorandum for a copy of this document.) It appears that the 1989 document refers to the post-Century period, while the 1988 document, which reported drops since the "demise of the must-carry rule," refers to the longer time period beginning with the 1985 Quincy decision. To the extent Dr. McGuire testified otherwise during her deposition, it appears that she was confused about the relevant time period. In view of the other available evidence of verified drops, the discrepancy is most readily explained by reference to the two different time periods. In any event, Dr. McGuire testified that in the 1988-1989 period APTS and NCTA worked together to produce correct figures, which were submitted to Congress. See McGuire Dep., pp. 174-76 (see Tab 2 of Appendix to this reply memorandum).

[29] Time Warner also criticizes the 1988 FCC survey, noting that APTS's Dr. McGuire had predicted that the survey was flawed and was likely to be criticized. At the time she made the comment, Dr. McGuire had not analyzed the survey herself. See McGuire Dep., pp. 212-13 (Tab 2 of Appendix to this reply memorandum). Moreover, there is no real dispute that both cable companies and public television stations reported to the FCC that hundreds of public television stations had experienced drops, noncarriage, or channel shifts since July 1985. Even if some of these instances were wrongly reported, the survey would still indicate a substantial volume of adverse carriage actions. More importantly, every study in this case, including those done by plaintiff NCTA and plaintiffs' expert, Dr. Besen, shows a significant amount of noncarriage of public television stations. See page 9 above; Pub. Br. May 26 Br., p. 26. Whatever flaws may exist in the FCC survey, they do not undermine that fundamental

2. Plaintiffs Have Failed To Impugn the Reliability of the CDC Data.

Both Time Warner and Discovery assail the Cable Data Corporation ("CDC") data, which show over 1,000 drops and even more substantial noncarriage of public television stations in the 1985-1992 period.[30] The criticisms they advance, however, amount to quibbles and speculation. They cite no evidence showing that any of the CDC data are incorrect.

Time Warner/Discovery first point out that the CDC data show many more drops than the APTS Master List. This is not surprising. As the public broadcasters have explained, the lists compiled by APTS were never intended to be comprehensive; they reflect only the information that came to the organization in response to requests for voluntary reports.[31]

There are any number of reasons why APTS would receive no data or incomplete data from busy station personnel operating with limited resources. Public television stations, some of which serve over 100 cable franchise areas, often did not know for sure whether cable operators were carrying their signals, and some could not afford to devote limited resources to monitoring

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and undisputed fact.

[30] See Pub. Br. May 26 Br., pp. 63-64 & n.91.

[31] See id. at 61-62.

cable carriage.[32] The CDC data, on the other hand, are taken from reports regularly submitted by cable operators and required by law for purposes of computing copyright fees. See Meek Decl. ¶¶ 24-32. Obviously, cable operators have first-hand knowledge of what signals they are carrying at any given time, and they have strong incentives to provide complete and accurate data on forms required by law.[33]

Time Warner/Discovery also observe that the CDC data show that many dropped public television stations were still not being carried in the first half of 1994. This is so, but it does

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[32] See Brugger Decl. ¶ 23 (Pub. Br. May 26 App., Vol. 1). Many stations are not even members of APTS. This includes many of the smaller stations, which tend to have fewer resources and are more vulnerable to drops. Id. ¶¶ 2, 21, 24. The "86% response rate" cited by Time Warner applied to only a single survey APTS conducted in 1991, a time when cable was exercising very substantial self-restraint with respect to carriage of public television stations (see page 29 & note 42 below). See Time Warner June 16 Br., p. 47; TW Ex. 42.

[33] Time Warner/Discovery cite three stations -- KWSE, KPTS, and KQED -- out of the 135 listed on the Master Chart, for which CDC data show drops, but the APTS data do not. Time Warner June 16 Br., p. 47 n.31. Even accepted as true, this is not a significant discrepancy, and certainly does not prove that the CDC data are incorrect. In fact, Time Warner/Discovery overstate the so-called discrepancy by reporting larger drops than reflected in the CDC data for KWSE and KPTS. Furthermore, the drops noted by Time Warner involve just a few hundred subscribers. It would be unreasonable to expect busy station personnel to have taken the time to communicate such information to APTS.

APTS did not use CDC data to track cable carriage in the 1985-1992 period because it was unaware at that time that the data could be used for this purpose. It is doubtful that APTS would have been in a position to pay on a regular basis for the special programming needed to produce such reports, even if it had been aware of this potential use of the data.

not signify any inaccuracy in the data. Mr. Meek, the expert witness who is most familiar with the CDC data, has testified that it is the best available source for cable carriage information concerning broadcast stations. Id. ¶ 29. The CDC data for noncommercial educational stations used by Mr. Feldman and Mr. Abbott were limited to drops of stations that would be entitled to carriage under the current must-carry criteria. These data report on cable systems within 50 miles of the station, with drop figures including only stations that had been carried for at least one reporting period (to assure that the station could deliver a good quality signal), and that had been dropped for at least two reporting periods (to avoid the effect of possible errors in reporting). Moreover, tests of the data show very few instances in which channel capacity or duplication criteria would have taken the station outside the protection of must-carry.[34]

In these circumstances, plaintiffs' assertions that the CDC data are inaccurate constitute pure speculation. There is no reason to doubt that the great majority of the drops and non-

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[34] See Feldman Decl. ¶¶ 10, 13; Pub. Br. June 16 Br., pp. 32-33 & nn.49, 50. Contrary to Discovery's assertion (Discovery June 16 Br., pp. 12-13), Mr. Feldman's method of reporting "subscriber drops" is entirely appropriate. If a cable system with 20,000 subscribers drops a public television station in 1985, and then grows to 100,000 subscribers in 1992, the station in 1992 was denied access to 100,000 cable subscribers as a result of the drop. It would be misleading to compute the effect of noncarriage in 1992 by reference to the system's 1985 subscriber levels.

carriage instances shown on the CDC reports reflect situations under which the station has a right to carriage under Section 5.

In fact, a more plausible explanation for many unresolved cable drops is recalcitrance on the part of cable operators. All but one of the public television station declarants who attempted to exercise must carry rights were met with resistance.[35] Closer examination of just a few examples suggests an intentional strategy of delay, with the cable system using a variety of tactics to avoid carriage of the public television station's signal. For example, after a year and a half of persistent correspondence and negotiations, which included initial promises to carry, a subsequent allegation of an inadequate signal, measurements confirming a good quality signal, and a threat to file a complaint with the FCC, WNIN was finally added by MWI Cable Systems, Inc., in the second half of 1994.[36]

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[35] See Anderson Decl. ¶ 7; Alpert Decl. ¶ 7; Beabout Decl. ¶ 8; Dial Decl. ¶ 10; Fogarty Decl. ¶¶ 6-7; Hosley Decl. ¶ 15; Lewis Decl. ¶ 13; Meuche Decl. ¶¶ 14-15; Smith Decl. ¶ 7; Thigpen Decl. ¶ 6.

[36] See Dial Decl. ¶ 10 & Ex. 7. See also, e.g., Meuche Decl. ¶ 15 & Ex. 7 (Crystal Cable TV refused carriage of WKAR based on a claim of inadequate signal from July 1993 until early 1995 when it was finally forced to carry the station after two FCC decisions); Smith Decl. ¶ 7 and KRSC 000207, 000216, 000220 (see Tab 5 to Appendix to this reply memorandum) (18 month delay before carriage); Malloy Decl. ¶ 9 & Ex. 5 (station dropped and not carried until December 1994).

Time Warner's assertion that the outstanding FCC complaints could not be responsible for the unresolved cable drops as of the 1994-1 reporting period is simply incorrect. At least 78 complaints had not been resolved as of May 1, 1994 --

Cable allegations of poor quality signal, probably the most commonly cited excuse offered for non-carriage, are often based on the cable system's failure to use proper technical equipment and standards in taking measurements. Station documents from APTS files show that some cable systems erect temporary masts of 35 feet or less, even as low as 10 feet, to simulate the system's actual receive antennae. Other systems use Radio Shack consumer antennae for these measurements.[37] As discussed in the Reply Declaration of Mr. Meek, such equipment does not comply with FCC measurement standards.[38]

In the face of this substantial evidence of cable recalcitrance, it is much more plausible to attribute the substantial portion of the uncured cable drops reflected in the CDC data, not to inaccuracy in the data (as plaintiffs speculate), but to the conduct of cable operators themselves.

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the time the case would have had to be resolved by the FCC (given the standard 46-day implementation period) to be reflected in the 1994-1 reporting period. See Brugger Decl. ¶ 34 & Ex. 12. These cases alone would account for almost 1 million of the unresolved instances of subscriber drops. See Warren Television Fact Book, 1995.

[37] See documents contained in Tab 4 to Appendix to this reply memorandum.

[38] See Meek Reply Decl. ¶ 11 & n.2 and FCC Clarification Order in MM Docket Nos. 92-259, 90-4, RM-8016, May 28, 1993, at ¶ 8 (broadcast signals must be measured with "generally accepted equipment that is currently used to receive signals of similar frequency range, type or distance from the principal headend").

In any event, whatever supposed flaws Time Warner/ Discovery may allege with respect to the CDC data, they cannot challenge the bottom line. Dr. Besen's data show substantial noncarriage of public television stations in the period prior to must-carry -- the same result as the CDC data.

3. Public Television Personnel Perceived That Public Television Stations Faced Significant Cable Carriage Problems.

The public broadcasters have submitted substantial evidence showing not only that there were many drops, shifts, and instances of noncarriage during the 1985-1992 period, but also that public television officials were concerned about these events and their implications for the future.[39] In its opposition brief, Time Warner picks out isolated statements in APTS documents from the 1990-91 period and a snippet of testimony from Mr. Downey's deposition as support for the proposition that (contrary to the testimony of plaintiffs' own expert) public television stations had few carriage problems in the period just prior to must-carry.[40] In fact, the cited statements do not in any way suggest either that public television stations had not experienced cable carriage problems or that public television officials were unconcerned about the situation.

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[39] See the declarations of Messrs. Brugger, Downey, and Abbott, and of 12 public television station managers, submitted in Volumes 1 through 4 of the Appendix to the Public Broadcasters' May 26 Brief.

[40] Time Warner June 16 Br., pp. 42-46.

The few statements Time Warner plucks out of 1990-91 APTS documents are observations that APTS had received a relatively small number of reports of drops or shifts during that period (at least compared with the volume of reports received in the 1985-1989 period). The statements must be read in light of the fact that the cable industry was exercising considerable self-restraint during the years prior to passage of the 1992 Act.[41] Moreover, Dr. McGuire and Mr. Brugger, APTS' President, testified that during much of this period NCTA worked with APTS to address cable carriage problems experienced by public television stations. As a result, during this time frame, a number of adverse actions were avoided or reversed within a short period of time.[42]

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[41] See Pub. Br. May 26 Br., pp. 29-30; NAB/INTV May 26 Br., pp. 87-89.

[42] Dr. McGuire explained during her deposition that in 1988, after the President of NCTA had spoken at the APTS annual meeting, "we were going to work together, and he came as the guest speaker and he appointed a person, their research director to be the cable liaison, and I was appointed as our cable liaison. . . . And it was publicized that public television stations would call me if they had a threat of a drop or if they had been dropped. And . . . then I would contact NCTA." McGuire Dep., pp. 174-75 (see Tab 2 to Appendix to this reply memorandum).

Dr. McGuire explained that that working relationship intensified in 1990. She testified that the NCTA President "made an announcement essentially asking his members not to drop public TV stations . . . And generally if I got a complaint from a station that they were being dropped I would call over to NCTA, on numerous occasions they would call the cable system, and a lot of these were resolved." Id. at 209.

Time Warner also cites deposition testimony of Mr. Downey, in which he agreed with the examiner's suggestion that cable carriage for public television was "generally very strong."[43] Again, the comment must be read in context. First, Mr. Downey has testified that there were many reports of adverse cable actions after the earlier must-carry rules were overturned. He recalled that, particularly during the 1985-1988 period, it seemed that he was learning on a daily basis about new drops and shifts of public television stations and the resulting harm to the stations.[44] During this period, he became aware of instances in which several stations on cable systems owned by some of the large multiple system operators experienced

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Mr. Brugger also described the cooperation between the two organizations in the period following negotiation of the 1990 NCTA-APTS must-carry agreement:

> When APTS was notified of a public television station that had received a threat or experienced an actual drop or shift, Dr. McGuire would contact NCTA to seek assistance. In many cases, NCTA was able to persuade the cable operator to reverse its action. As a result of these efforts, public television stations experienced relatively few drops or shifts in the 1990 to 1992 period.

Brugger Decl. ¶ 32 (Pub. Br. May 26 App., Vol. 1). See also N0005703 (Pub. Br. May 26 App., Vol. 5, Tab T).

[43] See TW Ex. 13, at p. 160.

[44] Downey Decl. ¶ 30 (Pub. Br. May 26 App., Vol. 4); see also Downey Dep., pp. 86-87 (Tab 2 to Appendix to this reply memorandum).

unannounced drops in the same time period.[45] These events caused considerable turmoil in the industry and presented stations with the constant threat of drops.[46] Mr. Downey also testified that he and many others in public television believed that cable was on its "best behavior" during the late 1980s and early 1990s when Congress was actively considering new must-carry legislation.[47]

Ultimately, the perception of various individuals about how much carriage public television stations were receiving is irrelevant, in view of the fact that the more systematic evidence of the CDC data and the study performed by Dr. Besen show that noncarriage of public television stations was widespread. Moreover, the historical evidence is only half the story. On the basis of a broad range of evidence, Congress made a predictive judgment that, even if noncarriage previously had been limited in scope, there was cause for serious concern about the future. In the case of must-carry, Congress acted primarily to "prevent anticipated harm." Turner, 114 S. Ct. at 2470.

There is no doubt that public television officials were concerned about the future if public television stations did not

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[45] Downey Decl. ¶ 31.

[46] Id. ¶¶ 30, 31; Downey Dep., pp. 63-64, 87.

[47] Downey Decl. ¶ 32. Mr. Downey's responsibilities did not include tracking cable carriage. Id. ¶ 30. Thus, he did not have knowledge of the full extent of the reports APTS was receiving throughout the 1985-1992 period.

receive must-carry protection. In testimony before Congress, public television representatives explained that public television stations, as noncommercial entities, are particularly vulnerable to adverse carriage actions. This is because cable operators understandably make carriage decisions on the basis of commercial criteria, which public television stations likely will not satisfy. See Pub. Br. May 26 Br., pp. 21-24. Both Mr. Downey and Mr. Brugger have testified in this case that the greatest concern they and other public television officials had was for the future. They perceived that, without the threat of must-carry regulation, cable operators would feel free to drop or shift public television stations and that the second and third stations in a market would be particularly vulnerable.[48]

The additional evidence developed on remand confirms that public television stations are likely to be at risk. Dr. Noll has testified at length concerning the economic incentives that motivate cable operators to drop broadcast stations, including particularly the second or third public

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[48] See Downey Decl. ¶ 32; Brugger Decl. ¶ 37.

Time Warner's description of a quote from Mr. Brugger contained in a 1994 trade press article ("We don't expect our stations will be taken off") as the "bottom-line conclusion on public television's need for must-carry rules" (Time Warner June 16 Br., p. 42) is a blatant mischaracterization. Mr. Brugger suggested at his deposition that he may have been quoted out of context; he testified there that his "expectation would not be [cable systems] would let multiple services in." Brugger Dep., p. 270 (emphasis added).

television station in a market. Noll Decl. ¶¶ 7-35. Because a public television station is not in a position to provide an incremental revenue source to a cable operator, it will appear less attractive than a cable program service. See id. ¶ 29; see also Brugger Decl. ¶ 37. This will be so even when the public television station has higher viewership ratings than the cable program service, so long as the latter provides significant advertising revenues or other financial benefits. See Noll Rebuttal Decl. ¶ 19. Moreover, the incentives that cause cable operators to drop broadcast stations are increasing as time passes. See Noll Decl. ¶¶ 24-29.

Of course, the very existence of this litigation suggests that local public television stations are at risk. Cable parties have declared candidly in this case that they intend to drop various public television stations if must-carry is overturned.[49] This evidence confirms that Congress was correct in concluding that public television needs must-carry protection.

The Besen data alone suffice to show that Congress correctly perceived that "significant numbers" of public television stations had encountered carriage problems in the absence of must-carry. Even if these problems had been less significant, it was entirely reasonable for Congress to conclude

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[49] See Pub. Br. June 16 Br., p. 21 & n.31.

that public television stations are particularly vulnerable to adverse carriage actions and need must-carry protection for the future.

B. There Is Substantial Evidence That Public Television Stations and Their Viewers Would Suffer Harm in the Absence of Must-Carry.

The public broadcasters' opening brief showed that Congress had evidence that lack of carriage on cable systems had caused harm to public television stations. Through APTS, a number of stations reported that drops and shifts were depriving cable subscribers of access to local public television services, thereby diminishing the availability of diverse noncommercial programming and interfering with the longstanding goal of universal access to public television services. See Pub. Br. May 26 Br., pp. 39-45. Congress also had substantial evidence that drops or shifts had caused stations to lose viewer contributions or that stations had been required to make extra expenditures in an effort to regain carriage. See id. at 31-39. In addition, Congress was aware that such losses could affect the financial health of the entire public television system, due to the interdependent nature of the financing for programs distributed by the Public Broadcasting Service ("PBS"). Under this financing scheme, revenue losses at even a small number of stations mean that less money is available to produce programming for the PBS National Program Service. See id. at 35.

The additional evidence developed by the public broadcasters -- both expert testimony and evidence from individual public television station managers -- reinforces the information presented to Congress. On the issue of financial harm, Mr. Abbott testifies that if a station loses access to a substantial number of potential viewers as a result of a drop, noncarriage, or channel shift, the station will lose viewers and, as a result, revenue from individual and business contributions.[50] As Mr. Downey explains, a station's loss of

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[50] Abbott Decl. ¶¶ 5-9, 13, 30-33. Appendix A to Discovery's opposition brief contains an attack on the model developed by Mr. Abbott to illustrate the effect a loss of access to cable subscribers can have on public television viewer contribution revenues. This appendix consists solely of lawyer argument and speculation. Discovery has produced no competent evidence showing that Mr. Abbott's assumptions are incorrect or that the range of potential revenue loss for each lost cable subscriber is unrealistic. Indeed, the fact that the viewership data cited by Discovery fall within the range used in Mr. Abbott's model demonstrates the reasonableness of his underlying assumptions. Compare Discovery June 16 Br., App. A, pp. 2-3, with Abbott Decl. ¶ 18. In any event, Mr. Abbott, PBS's Senior Vice President for Development and Corporate Relations, is clearly in a better position to testify on the subject of viewer contributions to public television stations than are Discovery's lawyers.

Moreover, Discovery does not even purport to challenge directly the central point of Mr. Abbott's testimony -- that a substantial loss of access to cable subscribers is likely to have a significant negative impact on the viewer contributions and corporate underwriting received by a public television station. This testimony, not the details of any particular computation, is the evidence on which the public broadcasters rely to support their central argument concerning financial harm. Whether a particular group of station losses falls at the high end or the low end or the middle of the range used in the model Mr. Abbott presents is irrelevant. The model is designed simply to demonstrate that the potential overall effect of a series of

any significant amount of revenue inevitably leads to a deterioration in the quantity and/or quality of its programming.[51]

Evidence submitted by individual public television station managers provides concrete examples of the harm stations have experienced as a result of adverse cable actions. These declarants report that, as a result of drops, noncarriage, or channel shifts, viewers lost access to unique programming, such as telecourses and coverage of state government activities.[52] They also report that, while it is often difficult to quantify financial harm (particularly in view of the fact that public television stations have limited resources to make such studies), drops and shifts have resulted in measurable losses of viewer contributions for the areas in which these actions have occurred.[53] Likewise, stations that were not carried by cable systems prior to the enactment of must-carry have seen increases

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drops or substantial noncarriage could be the loss of millions of viewership contributions to the public television system.

[51] Downey Decl. ¶¶ 24-29.

[52] See, e.g., Hosley Decl. ¶¶ 10, 13; Lewis Decl. ¶ 11.

[53] See, e.g., Alpert Decl. ¶¶ 13-14; Hosley Decl. ¶ 12; Lewis Decl. ¶ 10; Malloy Decl. ¶ 10; Meuche Decl. ¶ 6.

in membership contributions and corporate underwriting since they gained access to large numbers of cable subscribers.[54]

Time Warner/Discovery brush this evidence aside, asserting that public television stations have not shown that they suffered harm as a result of adverse carriage actions. This remarkable assertion is wholly at odds with common sense and, indeed, with plaintiffs' own claims in this case. Even if there were no evidence on this issue, it should be obvious that a broadcast station that is dropped by a cable system is likely to suffer some harm.

As shown below, the Time Warner/Discovery arguments are without merit.

1. Plaintiffs' Arguments Concerning the Health of the Public Television System Must Be Rejected.

In support of their claim that public television stations are not harmed by the absence of must-carry, Time Warner and Discovery argue that public television as a whole is supposedly financially healthy.[55] Even if this were so, it would be irrelevant. Congress did not assume that the entire public television system was in jeopardy without must-carry. Instead, it was aware that public television stations were a

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[54] See, e.g., Anderson Decl. ¶ 10; Beabout Decl. ¶ 9; Hosley Decl. ¶ 17; Lewis Decl. ¶ 14; Smith Decl. ¶ 9; Thigpen Decl. ¶ 9.

[55] Time Warner June 16 Br., pp. 39-41; Discovery June 16 Br., p. 5.

particularly vulnerable group and that a substantial number of these stations had suffered harm from adverse cable carriage actions. While Congress was advised that a large volume of noncarriage could eventually weaken the entire system (due to public television's interdependent financing structure for programming), see page 34, supra, there is no indication that Congress based its enactment of Section 5 on the premise that the system as a whole was in imminent danger of collapse.

Likewise, the Supreme Court did not require a showing that the entire system was in economic jeopardy. So long as "significant numbers" of public television stations were harmed by adverse carriage actions, Congress could conclude that statutory protection was appropriate. Turner, 114 S. Ct. at 2471. The Court sought evidence that "local broadcast stations" (not the system as a whole) curtailed broadcast operations or suffered a serious reduction in operating revenues. Id. at 2472. These statements do not suggest that system finances are the issue.

In any event, the proposition that the public television system is financially healthy is a fantasy.[56] As the

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[56] Time Warner pulls many statements out of context in an effort to support its claims. [REDACTED]

primary support for this assertion, Time Warner/Discovery allege that total public television revenues and revenues from individual and business contributions to public television rose steadily during the 1985-1992 period. The declaration of Edward J. Coltman, Director of Policy Development and Planning for the Corporation for Public Broadcasting ("CPB"), explains the fallacy of this assertion. When inflation is taken into account, both total revenues and individual and business contribution revenues rose at a relatively slow rate during the 1985-1988 period and then were essentially flat during the 1989-1992 period. See Coltman Decl. ¶¶ 5-6.[57] Particularly when compared with the growth rates for many other media sectors (including cable programmers) during this period, these revenue trends indicate

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[REDACTED]

In the 1985-1992 period, the public broadcasters were looking primarily to the regulatory and legislative processes for solutions to carriage problems. Must-carry issues were mentioned prominently in documents relating to those processes, as indicated in Time Warner's own appendix. See TW Ex. 14, at CPB006808 (CPB congressional testimony, Nov. 18, 1987); TW Ex. 15, at CPB006731 (CPB congressional testimony, Mar. 10, 1988).

[57] From 1988 through 1992, public television revenues rose less than two percent in constant-dollar terms, which was slightly more than one half of the rate that such revenues rose between 1985 and 1988 (3.8%). Similarly, between 1988 and 1992, individual and business contributions grew at a compound annual rate of less than two percent, which is less than half the rate they grew from 1985 to 1988 (5.0%). Coltman Decl. ¶¶ 5-6. Mr. Coltman's declaration appears at Tab 1 of the Appendix to this reply memorandum.

that public television was not in robust financial condition as of 1992. Id. ¶ 5.[58] Of course, whatever the absolute level of public television revenues in the 1985-1992 period, they are undoubtedly lower than they otherwise would have been in the absence of adverse cable carriage actions.

In addition, system-wide revenues provide no indication of the financial well-being of individual public television stations. As of fiscal year 1992, a significant number of public television stations were at risk. In that year, more than 16 percent of CPB-qualified public television stations had a ratio of current assets to current liabilities of less than 1:1, indicating that they were unable to meet their current obligations. See Coltman Decl. ¶ 8.[59] For stations in these circumstances, any substantial loss of revenue would certainly

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[58] The revenue growth of public television stations was less than a quarter of the revenue growth of the cable networks that reported publicly during the same time periods. Coltman Decl. ¶ 5. Moreover, the growth in overall revenues from individual and business contributions during the 1980s appears to be largely the result of the initiation of fundraising programs by a number of stations and the adoption of more sophisticated fundraising techniques by others. See Abbott Decl. ¶ 19. If anything, the increasing significance of individual and business contribution revenues means that access to cable subscribers is even more important than ever for public television stations. See id. ¶¶ 7-8.

[59] The ratio of current assets to current liabilities is a standard measure of a business's financial viability. Coltman Decl. ¶ 9.

diminish the ability to maintain the quality and quantity of programming and could threaten the station's existence.[60]

KCSM, a public television station located in San Mateo, California, is a prime example of a station that could not withstand the blow of substantial carriage difficulties. Two sets of drops by Viacom in the 1980s, resulting in loss of access to more than 200,000 cable subscribers, left the station "seriously weakened." By October 1992, the station was "in very weak financial condition and in danger of being shut down."[61]

Time Warner/Discovery make much of the fact that no public television stations actually went off the air in the 1985-1992 period. As Mr. Coltman explains, it would be unusual for a public television station to go dark because most have financial safety nets, in the form of federal, state, or local government

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[60] Coltman Decl. ¶ 8. Loss of any significant amount of revenue is likely to mean a deterioration in the quality and/or quantity of programming a station is in a position to offer, regardless of its financial condition. Mr. Downey explains in his declaration that programming constitutes the primary variable cost for a station, so that any incremental loss of revenue is likely to affect the amount of programming a station can either produce or acquire. Downey Decl. ¶ 25. Accord Coltman Decl. ¶ 7.

[61] Hosley Decl. ¶¶ 10, 14 (Pub. Br. May 26 App., Vol. 2). Vermont ETV's experience after being dropped from a major Montreal cable system also illustrates the negative impact a substantial drop can have on a public television station's revenues and its ability to acquire programming. In a single year, Vermont ETV lost over $150,000 in contributions from Canadian viewers and had to cut back on its acquisition of PBS programming. See Green Decl. ¶¶ 8, 10 (Pub. Br. May 26 App., Vol. 2).

funding or the backing of an educational institution. In addition, some stations that have encountered serious financial difficulties have survived by merging with another public broadcasting station. The fact that no station has actually gone dark is by no means an indication that all stations are financially healthy. Coltman Decl. ¶ 9.

Time Warner/Discovery also argue that public television could not have been harmed in the absence of must carry because some public television stations began operating during the 1985-1992 period. As an initial matter, plaintiffs' statistics on new entry are exaggerated. Based on the information available to CPB,[62] the majority of the noncommercial educational stations that were activated during the 1985-1992 period were either "satellite" stations (which repeat the signal of another station, simply transmitting the same signal to a broader area) or religious or student-run stations, which are not CPB-qualified (and therefore are not covered by Section 5). Several others were new services initiated by existing licensees and thus not true new entrants. Still others were licensed to state or local government entities, which are not as dependent on viewer contributions for their existence. This leaves only eight of the new stations that might have given much weight to the risks of adverse carriage actions in making a decision about activation.

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[62] CPB was able to identify only 45 stations that were activated in the 1985-1992 period. Coltman Decl. ¶ 10.

Coltman Decl. ¶ 10. Accordingly, the entry figures cited by plaintiffs are not indicators of a healthy public television system. Id.

Finally, as explained in the public broadcasters' opposition brief (at pp. 23, 34), public television stations are nonprofit entities with a mission to provide educational services. Because of this noncommercial orientation, cable carriage will not necessarily be a determinative factor in a licensee's decision to begin operations.

2. Time Warner's "Broadcast Station Rebuttal" Should Be Disregarded.

As further support for its claim that public television stations did not suffer harm as a result of drops and shifts, Time Warner offers a massive "broadcast station rebuttal" volume. While Time Warner characterizes this rebuttal as "devastating,"[63] it is actually full of irrelevant, nonprobative and inaccurate bits of information, entitled to no weight.

Time Warner's "rebuttal" volume lists virtually every public television station that is identified in the record of this case and pastes together bits and pieces of the discovery record relating to that station. In fact, much of the material is taken out of context, in many cases in a misleading way. For the most part, the evidence has no bearing on whether the station in question suffered harm from adverse cable action. Moreover,

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[63] Time Warner Broadcast Station Rebuttal, p. i.

Time Warner brushes off evidence in the record that demonstrates the harm many of these stations experienced.

As an initial matter, the Time Warner "rebuttal" virtually ignores the primary underpinning of Section 5 -- the government interests in ensuring universal access to public television services and the widespread dissemination of multiple information sources. Promotion of the dissemination of diverse programming sources, available to both cable and non-cable households, is one of the fundamental interests recognized by the Supreme Court in this case. See Turner, 114 S. Ct. at 2469. Even if public television stations had submitted no evidence of financial harm, they and their viewers would suffer injury from adverse cable carriage actions. As shown in the public broadcasters' earlier filings, public television stations offer a wide range of programming, filling a variety of needs in a community. When hundreds or thousands of subscribers to a cable system lose access to college-level telecourses, coverage of the state legislature, or any other services offered by a local public television station, the result is to deprive viewers of diverse noncommercial programming they have supported with their tax dollars and that Congress intended to be available to all

Americans.[64] Solely on the ground that it ignores these significant interests, the Time Warner "rebuttal" is inadequate.

With respect to financial harm, Time Warner simply attempts to trivialize every claim, to the point of absurdity. It asserts that any financial loss a station has alleged as a result of a drop or channel shift is "de minimis" because it does not threaten operation of the station or the public television system as a whole. Whether the loss in question is $1,700, or

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[64] Discovery is wrong in its suggestion that this point comes close to being content-based. See Discovery June 16 Br., p. 6. The Supreme Court plurality expressly concluded that Congress' interest in widespread dissemination of multiple information sources is not a content-based interest. Turner, 114 S. Ct. at 2469. Moreover, the point is not that public television stations are necessarily better, but that they are different. By virtue of their noncommercial status and their statutory mandate to serve underserved audiences, public television stations inevitably provide something different from a commercial service, even one that attempts to mimic public television. Thus, loss of access to that service reduces the diversity Congress sought to promote.

In this connection, Mr. Feldman testified that the increase in cable carriage of public television stations following the 1992 Cable Act was accompanied by an overall increase in viewership of such stations. Feldman Decl. ¶¶ 19-21. Ms. McLaughlin, one of plaintiffs' experts, asserts that the correlation between carriage and viewership that Mr. Feldman found would be weaker if one station were removed from his analysis (although she acknowledges that, even with this adjustment, the data would show that [REDACTED] was due to must-carry). McLaughlin Rebuttal Aff. ¶¶ 5, 7-8. Of course, the result of any study could be altered by removing the data one does not like, but this is not an appropriate statistical technique. See Rohlfs Reply Decl. ¶¶ 23-29. In any event, three other experts -- Dr. Rohlfs, Mr. Meek, and Mr. Schutz -- have confirmed the relation between cable carriage and increased viewership, thereby reinforcing Mr. Feldman's results. See Pub. Br. June 16 Br., p. 24 n.35.

$43,000, or $90,000, according to Time Warner it does not indicate harm.[65] While these amounts probably are insignificant to Time Warner, with its billions of dollars in annual revenues, they mean a great deal to a non-profit television station. The loss of a figure like $43,000 could require a public television station to make significant cutbacks in programming.[66]

Time Warner's "rebuttals" reflect a host of other errors. The following are some of the more significant examples of Time Warner's missteps:

- Time Warner mischaracterizes entries on an APTS Master List submitted with Mr. Brugger's declaration, asserting that the stations in question alleged no harm from the adverse carriage actions shown there. In fact, virtually all of these stations suffered harm, as described in other parts of the public broadcasters' filings. The fact that a station did not submit a specific description of harm to APTS does not signify the absence of harm.

- Time Warner cites selected revenue figures as evidence that a station did not suffer harm from drops, shifts or noncarriage. As explained in Mr. Coltman's declaration, revenue alone does not reveal the financial condition of a station. Moreover, gross revenues are simply not sensitive enough to allow

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[65] See Time Warner Broadcast Station Rebuttal, p. xii (citing losses reported by Iowa Public Television, KBYU, and KCSM respectively).

[66] See Downey Decl. ¶ 25. This point is illustrated by the experience of KRSC when it was added to a number of cable systems in northeastern Oklahoma. The resulting increase in corporate underwriting -- approximately $35,000 (which Time Warner presumably would regard as de minimis) -- allowed the station to expand its telecourse offerings and other programs and its hours of operation. See Smith Decl. ¶¶ 9, 13. The lack of carriage prior to must-carry deprived KRSC of the opportunity to gain those financial benefits.

detection of a cable action in a single community. Revenues expressed in current dollars do not provide an accurate picture of the trends for a station, in any event. Coltman Decl. ¶ 11.

- Many of Time Warner's allegations simply have no bearing on the existence of harm from an adverse cable action. For example, the fact that a station and a cable system are not in the same ADI is irrelevant, since the ADI criterion, found in Section 4 of the Cable Act, does not apply to public television stations.

- Time Warner completely misuses some documents. For example, it alleges that some public television stations duplicate other stations in a market, citing figures plucked from an unmarked column in an APTS document. Time Warner labels the figures as percentages when they actually represent number of programs in a particular category. The error causes the percentages to be vastly overstated and leaves a wholly misleading impression with the reader.

- Time Warner announces that KCSM "was not at risk of substantial financial harm in the absence of a must-carry rule."[67] However, evidence in the record shows that the station lost $90,000 per year as a result of Viacom drops alone, and its General Manager testified that by 1992 the station was in danger of shutting down.[68]

These and other deficiencies are discussed in greater detail in the Public Broadcasters' Reply to Time Warner's Broadcast Station Rebuttal, filed with this reply memorandum. We refer the Court to that volume.

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[67] Time Warner Broadcast Station Rebuttal, p. 213.

[68] Hosley Decl. ¶¶ 10, 12, 14.

3. Discovery's Arguments Regarding Harm Are Wholly Inappropriate.

Some of Discovery's arguments echo those of Time Warner and have been addressed above. However, several of Discovery's points appear particularly egregious and warrant separate mention.

a. Discovery alone disputes the public broadcasters' contention that public television stations suffer harm as a result of unilateral channel repositioning. It dismisses the public broadcasters' description of the harm that results from repositioning, suggesting that such injuries are inconsistent with the experience of Discovery personnel, "imaginary," or "not a typical or generic injury."[69] This is contrary to the contentions of Discovery's co-plaintiffs. The Turner programmer plaintiffs have argued emphatically that repositioning of their program services substantially interferes with their ability to attract new viewers. Turner May 26 Brief, pp. 40-41.

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[69] Discovery June 16 Br., pp. 15-17. Discovery also asserts that a public television station should have no right to be carried on any channel other than its over-the-air channel. Id. at 15. Prior to the Quincy decision, however, some stations had been assigned for long periods of time to a different channel on certain cable systems. In such a situation, an involuntary shift to a different channel could cause a variety of problems, from viewer confusion to inability of viewers to receive the signal on the new channel. See, e.g., Alpert Decl. ¶¶ 5, 9-10. Under Section 5, a public television station has a right to be carried on a channel different from its over-the-air channel only if the cable operator carried it on that channel as of July 19, 1985. 1992 Cable Act § 5(g)(5).

There is no reason to believe that public television stations do not suffer similar harm. Indeed, because broadcast stations often identify themselves by reference to their over-the-air channels, a public television station may well suffer more harm from being repositioned than a cable program service. See Downey Decl. ¶ 21. Moreover, Discovery's position is directly contradicted by testimony from a number of public television station managers, who have first-hand knowledge of the problems of viewer confusion, technical interference, and inability to receive the station's signal that Discovery so readily brushes off.[70]

b. More remarkable than its stance on repositioning, however, is Discovery's readiness to argue that public television stations suffer no financial harm as a result of being dropped or not carried at all. Discovery should be embarrassed to take such a position. In contrast to public television stations, which indisputably have experienced hundreds of drops and instances of noncarriage (by their own expert's count and as shown by other evidence), Discovery has pointed to no adverse carriage actions involving the Discovery Channel and only one drop and 30 instances of noncarriage or part-time

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[70] See, e.g., Malloy Decl. ¶¶ 6, 8; Alpert Decl. ¶¶ 5, 9-10; Lewis Decl. ¶¶ 10-11. See also, e.g., Turner May 26 Brief, pp. 40-41 ("There is no dispute between the parties in this litigation that carriage on lower channel positions and/or positions adjacent to established, popular programming invites viewer sampling and promotes viewership.").

carriage that The Learning Channel allegedly experienced as a result of must-carry. See Goodwyn Decl., Ex. 3. Discovery claims that, as a result of that single drop and the 30 instances in which a cable operator might have chosen to carry The Learning Channel, it has lost more than $2.5 million. Id. ¶ 16.

Of course, public television stations are noncommercial entities and receive revenues in the form of viewer and business contributions rather than subscription fees. Nevertheless, in view of Discovery's bold claim that it has lost millions of dollars as a result of a single drop and a few dozen instances of noncarriage or partial carriage, its assertion that public television stations have suffered no financial harm at all is disingenuous in the extreme.[71]

* * * * *

In the end, Time Warner/Discovery have failed to undermine in any respect the evidence submitted by the public broadcasters. In any event, their points are irrelevant. At a

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[71] Discovery also suggests that, in arguing in support of must-carry, public television stations are seeking special favors, above and beyond what they deserve. See Discovery June 16 Br., pp. 6, 31-32. To the contrary, public television seeks to prevent cable operators from blocking their subscribers' access to the full scope of public television services. To the extent public television stations attempt to receive carriage in communities they could not ordinarily reach (due to the UHF handicap), this is entirely consistent with Congress' intent that public television services be available to all Americans. Discovery's suggestion that public television stations should simply be content with a limited over-the-air audience in those communities is flatly contrary to that congressional intent.

minimum, the evidence of noncarriage provided by their own expert indicates the need of public television stations for must-carry protection. And apart from any historical evidence, Congress had substantial evidence to support its judgment that public television stations are in a vulnerable position in view of the commercial incentives that govern cable operators' carriage choices and that these stations therefore need protection for the future.

Congress also reasonably concluded on the basis of evidence before it that Section 5 would not create any significant burden on cable companies, and plaintiffs have not shown that they have been unduly burdened as a result of honoring the must-carry claims of public television stations. Moreover, as shown in the public broadcasters' opposition brief (pages 35-43), plaintiffs have not shown that any of the "less restrictive alternatives" they list would be "as effective[] as" Section 5 in serving the interests that underlie must-carry protection for public television.[72] The Court should therefore grant the public broadcasters' summary judgment motion.

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[72] See Alliance for Community Media v. FCC, No. 93-1169 (D.C. Cir. June 6, 1995) (en banc), slip op. at 35.

CONCLUSION

There is no dispute of material fact that would preclude summary judgment upholding Section 5. For the reasons stated above and in the public broadcasters' briefs filed on May 26, 1995, and June 16, 1995, the public broadcasters' motion for summary judgment should be granted. Plaintiffs' motions for summary judgment with respect to Section 5 should be denied.

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Dated: June 30, 1995

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June, 1995, I caused copies of the Public Broadcaster Defendant-Intervenors' Reply Memorandum in Support of Motion for Summary Judgment, the Appendix thereto, and the Public Broadcaster Defendant-Intervenors' Reply to Time Warner Broadcast Station Rebuttal, to be sent by hand delivery, Federal Express, or Network Courier as indicated to those named on the attached Service List.

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